IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.344 OF 1984

Vithaldas Dattatrayatraya Shah ...Appellant

vs.

Akaram Chandru Ghatage
Nivrutti Chandru Ghatge ...Respondents

Mr.Vineet B. Naik for the Appellant
Mr.Anilkumar Patil for Respondent No.1

CORAM: A.S.OKA,J.
DATE : NOVEMBER 27,2007.

ORAL JUDGMENT:

1. The submissions of the learned Advocate for the Appellant were heard yesterday. Today, the Appeal is kept for dictation of the Judgment. The Second Appeal is preferred by the unsuccessful first defendant. The trial court dismissed the suit filed by the first Respondent-Plaintiff. In an Appeal preferred by the first Respondent, the Appellate Court has interfered. The Appellate Court held that the suit mortgage stands extinguished. The Appellate Court directed the Appellant to hand over the possession of the suit land to the first Respondent.

2. According to the case of the first Respondent, the suit land was owned by him along with the second Respondent (original second defendant). On 16th June 1964, the first Respondent executed in favour of the Appellant's father a registered document which according to the first Respondent is

a mortgagee by the conditional sale. The document provided for a period of 5 years for re-payment of mortgage money of Rs.300/-. The document further provided that if the mortgage was not redeemed within a period of 5 years, the same shall be treated as absolute sale. The first Respondent filed a suit for redemption of mortgage and for possession.

3. The Appellant contested the suit. Initially, a written statement was filed by the guardian of the Appellant when he was minor. After attaining majority, the Appellant filed a separate written statement contending that the transaction was of absolute sale with the condition to repurchase and as the option was not exercised within a period of 5 years, he has become absolute owner of the suit land. A contention was raised that after the demise of his father he is not the only legal representative of the deceased father, and there are other legal representatives. A contention was raised that in any event the first Respondent has not deposited the mortgage money within the time provided by the document. It was pointed out in the written statement that in the year 1971, the first Respondent forcibly dispossessed him and he was forced to file a suit. In execution of the decree passed in the said suit, he obtained possession on 19th June 1973.

4. The learned trial Judge dismissed the suit by holding that the Appellant has proved that the suit transaction was never

entered into between the first Respondent and the deceased Dattatraya (the father of the Appellant). The learned trial Judge, however, accepted the case that the document is of a mortgage is by conditional sale. The learned trial Judge held that two sons and a daughter of deceased Dattatraya were necessary parties to the suit.

5. In the Appeal preferred by the first Respondent, an application was made for the amendment of the plaint. The said amendment was for contending that the real mortgagee was the Appellant and not his father Dattatraya. The said amendment was allowed and the plaint was amended. The Appellate Court held that the transaction was in the nature of a mortgage by conditional sale and that there was no requirement of the statute of depositing the mortgage amount in Court. The Appellate Court relied upon the order passed by the Authority under the Maharashtra Debt Reliefs Act,1975 (hereinafter referred to as the said Act of 1975) holding that all the outstanding debts of the first Respondent were extinguished. Therefore, the Appellate Court proceeded to pass a decree as aforesaid.

6. Second Appeal was admitted on 27th July 1984 by this Court by observing that the grounds 2,3 and 5 raised substantial questions of law. The said grounds read thus :

2) That the substantial question of law that arises in this Second Appeal is whether the suit for redemption of the mortgage suit land by conditional sale on 16th June 1964 filed by the Respondent No.1 original Plaintiff was maintainable in view of the fact that the Respondent No.1 had not paid the amount of loan in time.

3) That the other substantial question of law that arises in this Second Appeal is whether the Respondent No.1 Plaintiff was entitled for relief under the Debt Reliefs Act,1975.

5) That the other substantial question of law that arises in this Second Appeal is whether the suit filed by the Respondent No.1 was bad in law as the Respondent No.1 had failed to deposit the mortgage amount in the Court at the time of the filing of the suit, as required under section 83 of the Transfer of Property Act,1982.

7. The submission of the learned Advocate for the Applicant is that on plain reading of the document, the transaction appears to be of absolute sale with a condition regarding option to repurchase the property. He submitted that even assuming that the transaction was in the nature of mortgage, as the mortgage money was not deposited in the court at the time of filing of the suit, the suit was not maintainable. He

submitted that the suit was not maintainable as all the legal representatives of deceased Dattatraya were not made parties. He invited my attention to section 4 of the said Act of 1975 and submitted that even assuming that there was a valid order passed under the said Act of 1975, the said order will not absolve the first Respondent from tendering or paying the mortgage amount. He submitted that even assuming that the debt was fully discharged under section 4 of the said Act of 1975, the said Act of 1975 specifically prescribes the consequences of such discharge under clauses (a) to (e) and none of the said clauses will help the first Respondent. He submitted that the Appellant had not filed any suit and at highest the order passed under the said Act of 1975 would have been of some help to the first Respondent if any suit was filed by the Appellant against the first Respondent. He, therefore, submitted that the finding on this aspect cannot be sustained.

8. I have carefully considered the submissions. In so far as the nature of the transaction is concerned, this court has not framed any substantial question of law. At this stage, considering the recitals in the document, no case is made out for framing substantial question of law on the said aspect. Therefore, the submission made by the learned Advocate for the Appellant as regards the nature of the transaction cannot be considered.

9. On plain reading of the document, the name of the Appellant is shown as a mortgagee represented by his guardian i.e. deceased father Dattatraya. Initially, the first Respondent alleged in the plaint that the mortgagee was the said Dattatraya. Later on, during the pendency of the Appeal, the plaint was amended for making out a case that the mortgagee was the Appellant herein. On plain reading of the document of mortgage, it is obvious that the Appellant was the mortgagee who was at the relevant time a minor and therefore he was represented by his father and natural guardian. Therefore, there is no merit in the submission that the suit was not maintainable on account of non-joinder of the other legal representatives of deceased Dattatraya.

10. Turning to the submission regarding the order passed under the said Act of 1975, it must be noted here that pending the trial, an issue was framed regarding alleged entitlement of the first respondent to a relief under the said Act of 1975. The issue was framed and was referred to the Competent Authority. The Competent Authority recorded a finding that all the outstanding debts of the first Respondent were extinguished. The said order of the Competent Authority has attained finality. The said order provided that every debt payable by the first Respondent on the relevant date including the amount of interest stands discharged. Section 4

of the said Act of 1975 provides for the consequences of the discharge of the debt. One of the consequence prescribed by the clause (e) is that every property pledged or mortgaged by such debtor shall stand released in favour of such debtor, and the creditor shall be bound to forthwith return the same to the debtor on the debtor making an application in writing in that behalf.

11. In the context of the order passed by the Competent Authority under the said Act of 1975, the Appellate Court has observed that the debt subject matter of the mortgage stands extinguished and therefore, it was not necessary for the first Respondent to deposit any amount in the Court. The said finding of the Appellate Court is based on legal fiction created by section 4 of the said Act of 1975. Therefore, no fault can be found with the view taken by the Appellate Court in that behalf. In so far as alleged requirement of deposit of mortgage money on the date of institution of the suit is concerned, reliance was sought to be placed on section 83 of the Transfer of Property Act,1882. It is obvious from the provisions of the said Act of 1882 that there was no such requirement to deposit the mortgage money at the time of filing the suit. Once the mortgage stands extinguished, the decree for possession of the mortgaged property in favour of the first Respondent-Plaintiff must follow.

12 In view of the aforesaid discussion, there is no merit in the Appeal and the same is accordingly dismissed.

JUDGE